No. 19A545

In the Supreme Court of the United States

DONALD J. TRUMP; THE TRUMP ORGANIZATION, INC.; TRUMP ORGANIZATION LLC; THE TRUMP CORPORATION; DJT HOLDINGS LLC; THE DONALD J. TRUMP REVOCABLE TRUST; and TRUMP OLD POST OFFICE LLC,

Applicants,

v.

MAZARS USA, LLP; COMMITTEE ON OVERSIGHT AND REFORM OF THE U.S. HOUSE OF REPRESENTATIVES,

Respondents.

On Application for Stay

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR A STAY OF MANDATE

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REPLY IN SUPPORT OF EMERGENCY APPLICATION

Whether the Court should grant a stay is not a close question. The Committee does not dispute that this subpoena is unprecedented, that the Court has historically granted review in cases like this, or that Applicants' ability to seek certiorari will be mooted absent a stay. The Committee nevertheless opposes a stay because "[t]wo-hundred twenty days ... have elapsed" since it issued the subpoena, it believes that the lower courts correctly applied precedent, and it "urgently needs" these records "to exercise its constitutional functions." Committee Opposition ("Opp.") at 1-2. But the Committee omits that it has *voluntarily* stayed enforcement of the subpoena for more than six months, that those same lower-court rulings generated opinions totaling nearly two hundred pages and three dissents, and that it cannot identify *any* potential legislation to which these records are relevant—let alone urgently needed.

The Court should grant the stay. This is a significant separation-of-powers clash between the President and Congress. The dissenting judges made a compelling case why review is warranted and the decision below is unlikely to survive further review. And the Committee now says it will suffer no irreparable harm so long as the Court hears this case "on an expedited basis this Term, if it does grant certiorari," *id.* at 2, while Applicants will obviously suffer irreparable harm if a stay is denied. There is simply no basis to deny interim relief and thus end this case before Applicants have the opportunity to file a certiorari petition. To that end, Applicants are prepared to proceed on any schedule that the Court deems appropriate should the stay pending certiorari be granted.

I. The balance of equities strongly favors Applicants.

The balance of equities is not close, Mot. 29-32, and nothing in the Committee's opposition alters that conclusion. The Committee cannot dispute that, absent a stay, this case will become moot before this Court can decide whether to hear it—the kind of irreparable harm that provides the "'most compelling'" basis for a stay. *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers). It argues instead that "Applicants do not articulate any valid reason" for a stay because "the President has no right to this Court's review of every case in which he seeks it." Opp. 25-26. But that is not Applicants' argument.

At this juncture, Applicants are not seeking a stay so this Court can decide the case on the merits. A stay is needed so that Applicants can file a certiorari petition—a "right" they do hold. *See* 28 U.S.C. § 1257; S. Ct. R. 10. The point of a stay pending certiorari is "'to protect this Court's power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals.'" *John Doe*, 488 U.S. at 1309. In fact, when this Court loses the chance to grant certiorari because the winning party moots the case, it penalizes this behavior by vacating the appellate decision. *See Azar v. Garza*, 138 S. Ct. 1790, 1792-93 (2018); *infra* 11. Preserving the Court's ability to decide whether it wants to hear this case is alone a sufficient reason to grant the stay pending certiorari. Mot. 26-27.

Nor have Applicants asserted that "every" petition a President files should be granted. Applicants have instead explained that the Court has rightly granted review in every case *like this one* in which a President has sought review. Mot. 15-16. And, because a dispute over a congressional subpoena for the President's personal papers

will become moot without the Court's intervention, it is difficult to imagine a stronger stay application. At bottom, ensuring that the President does not suffer case-mooting harm in a major separation-of-powers clash with Congress should end any debate over Applicants' right to a stay.[1]

The Committee responds that granting relief would mean that the President "has the right to stall any Congressional subpoena to which he objects through the months or years that it takes for a challenge to work its way through the lower courts and for this Court then to grant or deny certiorari." Opp. 26. But the Committee had every opportunity to press for enforcement of the subpoena in the district court and in the court of appeals. It instead chose to defer enforcement for more than six months so those courts could hear this important case without needing to adjudicate requests for emergency relief. *See* Mot. 7-8. The only court to which the Committee is unwilling to extend that courtesy is this one.

Regardless, granting relief in cases like this will have little to no bearing on the House's "ability to conduct oversight or to collect information about the Executive Branch." Opp. 26. That is because the case-mooting problem Applicants confront is a product of the Committee's decision to circumvent the Executive Branch and seek the

[1] That said, Applicants have been unable to find any case in which a President's certiorari petition has been denied. The Committee cites three cases that it suggests fit the bill. Opp. 26. But none involved the President himself, the President's personal records, or the President's records—period. *See Office of President v. Office of Indep. Counsel*, 525 U.S. 996 (1998) (Deputy White House Counsel resisted giving grand-jury testimony); *Rubin v. United States*, 525 U.S. 990 (1998) (Secret Service officers resisted giving grand-jury testimony); *Office of President v. Office of Indep. Counsel*, 521 U.S. 1105 (1997) (grand-jury subpoena regarding meetings between the First Lady and White House Counsel).

records from his accountants. Mot. 4-7. When Congress subpoenas the Executive Branch, the recipient can object, retain the documents, and risk contempt. But since it is "unlikely that the third party would risk a contempt citation," there is a "limited class of cases where denial of" interim relief "would render impossible any review whatsoever of an individual's claims." *United States v. Nixon*, 418 U.S. 683, 691 (1974) (citations and quotations omitted). Unsurprisingly, then, all the Committee's cases involve the denial of a stay pending certiorari where the recipient was willing to challenge the subpoena's legality. *See Office of President v. Office of Indep. Counsel*, No. A-108, 1998 WL 438524, at *1 (U.S. Aug. 4, 1998) (Rehnquist, C.J., in chambers) (Deputy White House Counsel refused to testify before a federal grand jury); *Rubin v. United States*, 524 U.S. 1301, 1302 (1998) (Rehnquist, C.J., in chambers) (Secret Service officers refused to testify to federal grand jury); *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319 (1994) (Rehnquist, C.J., in chambers) (Senator refused to comply with congressional subpoena). Dissatisfaction with the judiciary's refusal to allow the Committee to "frustrate any ... inquiry" into the subpoena is not a justification for mooting Applicants' ability to seek certiorari. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 n.14 (1975).[2]

[2] The Committee also attempts to minimize the harm Applicants will suffer by arguing that "the documents ... do not contain trade secrets, privileged information, or other highly sensitive information (such as law enforcement information)." Opp. 27. But these documents are privileged, Mot. 28 n.2, and—contra the Committee's assertion, Opp. 21—Applicants did raise that point below, D. Ct. Doc. 1 at 11; D. Ct. Doc. 11-1 at 3; CADC Doc. 1814258 at 3. They are also highly sensitive. The subpoena seeks confidential records that aim to uncover every detail of the President's family businesses over the last decade. Regardless, irreparable harm does not turn on trade secrets, privilege, or sensitivity—it turns on confidentiality. Mot. 28.

The claim that the harm Congress suffers through "delay ... by depriving it of important information ... outweighs any harm Applicants might suffer from Mazars' compliance with the subpoena" is thus meritless. Opp. 23. The Committee argues that it needs this information in order to legislate. *See id.* at 23-24. But that claim is, to put it charitably, nebulous. The Committee cannot identify *any* "potential legislation" to which these records are relevant—let alone urgently needed. *Id.* at 24. It decries what it perceives as an effort to "second-guess" Congress's view of what information is needed to legislate. Opp. 24. But Congress is not a superlitigant who automatically wins the balance of equities. This Court does not "assume … that every congressional investigation … overbalances any private rights affected." *Watkins v. United States*, 354 U.S. 178, 201 (1957).[3]

Congress has an interest in *lawfully* gathering information to assist in its legislative pursuits. But what matters here is that the Committee identifies no reason why it needs these records immediately. A generic interest in collecting information is not irreparable, pales in comparison to the serious harm Applicants will suffer absent a stay, and provides no compelling basis to moot this case before the Court can decide whether it warrants review.

[3] The Committee also points to its generic interest in exercising "oversight of the Executive Branch" as justifying its urgent need for these documents. Opp. 24-25. But the D.C. Circuit rejected that as a rationale for why the subpoena has a legitimate legislative purpose. App. 37-38. "The challenged subpoena—or, more specifically, the portion of the subpoena that seeks a sitting President's financial information—would produce no relevant 'information about' laws that apply to ordinary Executive Branch employees." App. 37 (cleaned up).

II. There is a reasonable probability that this Court will grant certiorari and a fair prospect that this Court will reverse the D.C. Circuit's decision.

This case is worthy of review and is likely to be reversed if certiorari is granted. Whether the Committee was engaging in prohibited law enforcement, whether it was investigating in an area where it can pass constitutional legislation, and whether it had statutory authority are all important issues over which there is a serious legal dispute. Mot. 16-26. Here too, the Committee cannot muster a strong opposition to Applicants' stay request.

To begin, the Committee barely contests the importance of this dispute. Nor could it. Mot. 13-15. This subpoena, and the D.C. Circuit's decision upholding it, are unprecedented. Congress may have a history of issuing subpoenas both generally, and to "third parties close to Executive officials" in particular, Opp. 20, but it has no history of issuing third-party subpoenas for the President's personal records. And, while this Court has explained "'that the President is subject to judicial process in appropriate circumstances,'" Op. 19 (quoting *Clinton v. Jones*, 520 U.S. 681, 703-04 (1997) (other citation omitted)), no court—at least before now—had ever upheld a presidential subpoena like this one as appropriate, Mot. 14-15. The Committee thus can try to characterize this as "a fact-bound dispute about the purpose of the Mazars subpoena" if it wishes. Opp. 11. But there is no way the Committee can mask this case's importance.

The Committee highlights the fact that "the President brought this suit in his individual capacity" and that the case does not involve a claim of executive privilege as additional reasons why review is unjustified. Opp. 10-11. But that was also true of

Clinton v. Jones. In fact, every reason the Committee offers for denying review here was rejected by the Court in explaining why it granted President Clinton's petition. Mot. 15. When cases break new ground by extending legal principles from other contexts to the President himself, this Court does not hesitate to grant review. *See, e.g.*, Brief in Opposition, *Trump v. Hawaii*, No. 17-965 (U.S.) (unsuccessfully arguing that "[t]he traditional justifications for granting certiorari are absent" because the case applied settled law to the President).

The Committee also argues that review is unwarranted because "Applicants do not ask this Court to adopt the reasoning advanced by Judge Rao's panel dissent, and this Court should not do so." Opp. 21. That assertion is mystifying. Applicants and Judge Rao agree that the D.C. Circuit did not evaluate the subpoena's "'real object,'" "'primary purpose,'" or "'gravamen.'" Mot. 18. It asked only whether passing legislation was "an insubstantial, makeweight" purpose. App. 28. And it held that the "avowal" of an illegal law-enforcement purpose does not "spoil[]" an "otherwise valid legislative inquiry." App. 27, 29. But, as Judge Rao explained, "the gravamen of the Oversight Committee's investigation … is the President's wrongdoing." App. 116. And though the Court has "upheld some congressional investigations that incidentally uncover unlawful action by private citizens," Judge Rao explained that investigating the "wrongdoing of the President … has never been treated as merely incidental to a legislative purpose." App. 112-13. That is Applicants' argument too.

The Committee disagrees. Like the lower courts, its view is that even though the "investigation was prompted[] in part" by a desire to determine if "President

Trump had failed to comply with existing law," the subpoena has a legitimate purpose so long as it "*can* lead to legislation." Opp. 13 (quoting App. 172) (emphasis added). If that is the test, then Congress's subpoena power is limited only by its imagination. Mot. 17-18. That forgiving standard cannot be reconciled with the admonition that "Congress is not a law enforcement agency; that power is entrusted to the Executive." *United States v. Welden*, 377 U.S. 95, 117 (1964). Nor is the Committee's assertion that "it is the *presence* of a valid legislative purpose, not the absence of any other purpose, that determines [a subpoena's] lawfulness," Opp. 13, defensible. The House is not exempt from the rule that courts "are 'not required to exhibit a naiveté from which ordinary citizens are free.'" *Department of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019); *see also United States v. Rumely*, 345 U.S. 41, 44 (1953) (courts must not refuse to "see what all others can see and understand" when evaluating the "congressional power of investigation." (cleaned up)). To be sure, the parties seriously dispute how to apply decades-old, if not century-old, decisions to a 2019 congressional demand for a President's financial records. Opp. 13-15. But the need for the Court's guidance is a reason to grant certiorari—not to deny it.

The Committee also tries to use the fact that this case raises a serious question about Congress's power to impose financial-disclosure regulations on the President as a reason to deny review. Opp. 16-18. But its limited and unpersuasive defense of the decision below is telling. Instead of explaining why the D.C. Circuit was correct, the Committee calls this a "poor vehicle" to decide that important issue. Opp. 16. But the Committee fails to appreciate that its concession—*i.e.*, that reaching this "broad

question," *id.*, in a subpoena case is problematic—cuts against its position. Since the D.C. Circuit needed to decide this issue to uphold the subpoena, *Tobin v. United States*, 306 F.2d 270, 276 (D.C. Cir. 1962), it should have narrowly interpreted the Committee's statutory authority, Mot. 23-24. But the D.C. Circuit instead crossed the Rubicon and became the first court ever to conclude that such regulations are constitutional. The question thus is not whether this important question should be reached, but which court should decide it. The D.C. Circuit should not have the last word as to whether, under the Constitution, Congress can impose financial-disclosure regulations on a coordinate branch of government.

Finally, the Committee argues that whether it had statutory authority to issue a subpoena to the President "is neither important enough for this Court's review nor relevant any longer to this case." Opp. 18. It is certainly important enough. As both Judge Katsas and the Executive Branch have explained, giving *every* congressional committee the license to subpoena *any* of the President's personal records creates enormous separation-of-powers issues. Mot. 25-26. The Committee criticizes Judge Katsas for not identifying where the line should be drawn. Opp. 20. But that puts the cart before the horse. After all, the whole point of the clear-statement rule and other narrowing constructions is to force Congress to clearly manifest its intent to trigger this concern before the Court is forced to step in and decide whether a constitutional line has been crossed.

The argument that the full House has now clearly manifested its intention to give the Committee that authority is no stronger. Opp. 18-19. While this case was on

appeal, Congress passed Resolution 507. That resolution purports to "affirm[] the validity" of the subpoena. App. 63. But the Committee's "instructions are embodied in the authorizing resolution. That document is the committee's charter." *Watkins*, 354 U.S. at 201. And, because "the delegation of power to the committee must be clearly revealed in its charter," *id*. at 198, the "scope" of its statutory authority must "be ascertained as of th[e] time" of the request and "cannot be enlarged by subsequent action of Congress," *Rumely*, 345 U.S. at 48. The D.C. Circuit never reached this retroactivity issue because it rejected application of a narrowing construction and held that "the plain text of the House Rules" already "authorizes the subpoena." App. 64. But if Applicants are correct that the Committee needs express authority under the House Rules to subpoena the President, the resolution does not solve the problem. As the D.C. Circuit held, Resolution 507 "purports neither to enlarge the Committee's jurisdiction nor to amend the House Rules." App. 63.

III. This case is not about impeachment.

The Committee's attempt to use the fact that "the House is now engaged in an impeachment inquiry" to deter the Court from granting the stay should be rejected. Opp. 22. The Committee concedes that it "did not originally seek the information in question pursuant to the House's impeachment power." *Id*. at 25; *see also* Mot. 29 n.3. Nor does the Committee dispute that attempting to transition to an impeachment-based justification at this late date would raise retroactivity problems, *supra* 10, since it is doubtful that "a defective subpoena can be revived by after-the-fact approval." App. 141 (Rao, J., dissenting from denial of rehearing en banc). The Committee, in

short, makes no "argument on the merits" that impeachment is an alternative ground for upholding *this* subpoena. Opp. 22.

Instead, the Committee suggests that the Court should deny a stay pending certiorari because "the House could quickly issue a new subpoena" if review is granted. *Id.* If the Committee took that step, however, then the petition would need to be granted, and the decision below would need to be vacated. *See supra* 2; *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). In other words, any attempt by the Committee to moot this case in order to thwart Supreme Court review would only confirm Applicants' entitlement to a stay. The Committee's attempt to avoid further review while preserving the decision below as precedent should be rejected. Congress should not be permitted to benefit from such gamesmanship.

Nor would any new impeachment subpoena "satisfy" Applicants' "objections." Opp. 22. The Committee would still lack statutory authority. As Judge Rao explained, "House Resolution 660 does not purport to sweep previously issued subpoenas into the ambit of the impeachment inquiry." App. 141-42. Moreover, as the House recently confirmed, the impeachment proceedings are limited to "Ukraine," H.R. Report 116-266, at 2 (Oct. 30, 2019), and the Committee's authority with respect to impeachment is limited to this "existing House of Representatives inquiry," H.R. Res. 660 (Oct. 31, 2019). Hence, while the House has relied on the existing inquiry to justify "subpoenas on the White House, the Office of Management and Budget, the Department of State, the Department of Defense, and the Department of Energy," H.R. Report 116-266 at 3, it has never cited it to justify this subpoena. These documents, in sum, are not even

"potentially ... relevant to that inquiry." Opp. 26-27. The House's impeachment-based desire to "be fully informed with all the information to which it is entitled," Opp. 25, simply has nothing to do with this case.

CONCLUSION

For all of these reasons, and for those presented in the application, Applicants respectfully ask that this Court order that the mandate for the United States Court of Appeals for the District of Columbia Circuit, which is now stayed pending further order of the Court, be further stayed pending the filing and disposition of a petition for a writ of certiorari.

Respectfully submitted,

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